United Nations AT/DEC/1183

Administrative Tribunal

Distr. Limited
30 September 2004
English
Original: French

ADMINISTRATIVE TRIBUNAL

Judgement No. 1183

Case No. 1276: ADRIAN Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Ms. Brigitte Stern, Vice President; Ms. Jacqueline R. Scott;

Whereas, on 8 November 2002, Jean-Christophe Adrian, a staff member of the United Nations, filed an Application requesting the Tribunal to order that:

"(a) [Human Resources Management Services, United Nations Office at Nairobi] (HRMS/UNON) should be estopped from discriminating against its staff members in same-gender domestic partnerships [and] be compelled to recognize same-gender domestic partnerships at least to the full extent HRMS/UNON has created its own precedent of recognizing opposite-gender domestic partnerships.

(b) HRMS/UNON and the entire [United Nations] Common System should henceforth construe the term 'Spouse', as it pertains to all relevant [United Nations] entitlements, to include at least individuals in domestic partnerships which have been duly registered and recognized in the country of origin (of either staff or non-staff individual in the partnership). The foregoing should apply irrespective of the gender of the individuals.

(c) ... a high level task force ... be convened in order to propose ways for timely effect to be given ... to the April 1998 consensus of [the Consultative Committee on Administrative Questions] CCAQ ...; the [United Nations] should expeditiously develop mechanisms and concrete policy supportive of the non-discriminatory recognition of domestic partnerships.

(d) The payment of compensation covering at least all benefits and entitlements which have been denied to [the Applicant] since 12 June 2000 ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 March 2003 and periodically thereafter until 31 July 2003;

Whereas the Respondent filed his Answer on 31 July 2003;

Whereas the Applicant filed Written Observations on 4 September 2003;

Whereas the facts in the case are as follows:

The Applicant, a national of France, joined the United Nations Centre for Human Settlements (UNCHS) in Nairobi, on a one-year project personnel appointment as an Associate Expert at the L-2 level, on 19 August 1990. The Applicant's appointment was subsequently extended several times and, effective 1 April 2002, he was granted a two-year fixed-term appointment as a Human Settlements Officer at the P-4 level, which appointment was extended for a further two-year period, effective 1 April 2004.

On 22 June 2000, the Applicant and his same-gender partner registered their domestic partnership under the French "Pacte Civil de Solidarité" (PACS) following which, on 26 June, the Applicant requested HRMS/UNON to grant his partner spousal benefits. On 10 July, HRMS/UNON informed the Applicant that his dependency status could be changed to "married" only if the law of his nationality legally recognized same-gender partnerships as a marriage. The Applicant was further informed that, since French law does not characterize domestic partnerships as a "marriage", the parties to such partnership are not "spouses" and therefore the Applicant's partner could not be recognized as a "spouse" or "dependent spouse" for the purpose of United Nations entitlements. On 21 August, the Applicant requested HRMS/UNON to review this decision.

On 7 September 2000, the Applicant requested the Secretary-General to review the administrative decision not to recognize his same-gender domestic partner as a spouse for the purposes of United Nations entitlements.

On 5 December 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Nairobi. The JAB adopted its report on 28 May 2002. Its considerations and recommendation read, in part, as follows:

"***Considerations:***

...

The Panel ... concluded that the 'Pacte Civil de Solidarite' was not the same legal instrument as a marriage ... under French law.

...

... Consequently, the cohabitation contract of the staff member would not enjoy any administrative privileges ...

...

... [W]hile it is true that there were several instances in which UNON recognized cohabitation contracts, the Panel has ... learnt that this practice was immediately suspended when it came to the notice of Headquarters. For a practice to become binding on the Secretary-General, it has to be uniformly applied in the conviction that the Secretary-General is so obliged to act (*opinio juris*). The fact that Headquarters had immediately suspended this practice, which it considered to be in contravention to its general application of the rules, shows that the practice was neither uniformly applied nor was it carried by *opinio juris*.

...

The Appellant also contends that the Secretary-General's interpretation of the word 'spouse' or 'dependent spouse' results in discriminatory treatment towards couples that have entered into cohabitation agreements in general and homosexual couples in particular. ...

The Panel understands that the Secretary-General has a justified financial interest in limiting the Organization's spousal payments to certain forms of cohabitation in order to avoid abuse of this entitlement. ...

He has chosen as ... points of reference the law of the home country of the staff member on the one hand, and the requirement of a legal marriage recognized by that home country law on the other hand. The question before the Panel was whether it is unreasonable and therefore arbitrary of the Secretary-General to have chosen these two points of reference in differentiating between who is eligible for spousal benefits and who is not.

The Panel took note of the fact that the staff member's home country, France, has made a clear distinction between marriage and domestic partnership. ...

... By creating a nexus between the entitlement and the staff member's home country law, the Secretary-General has used a reasonable and reliable standard by which to discriminate between staff members with the right to spouse entitlements and staff members who are not so entitled.

...

Thus the nexus to the home country law together with the necessity of a legal marriage also contributes to ensuring that the principle of equal treatment of staff on as broad a basis as possible is not violated. Since this is the case, it cannot be said that the Secretary-General's interpretation of the term 'spouse' or 'dependant spouse' is arbitrary, as there is a reasonable justification for it. Since it is not arbitrary, there is no violation or non-observance of the Appellant's terms of appointment in the sense of staff regulation 11.1.

...

Recommendation:

... the Panel recommends to the Secretary-General to reject the appeal."

On 24 October 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had accepted the JAB's conclusions and, in accordance with its unanimous recommendation, had decided to take no further action on his appeal.

On 8 November 2002, the Applicant filed the above-referenced Application with the Tribunal.

On 20 January 2004, ST/SGB/2004/4, entitled "Family status for purposes of United Nations entitlements" was issued, stating, inter alia, the following:

> "4. A legally recognized domestic partnership contracted by a staff member under the law of the country of his or her nationality will also qualify that staff member to receive the entitlements provided for eligible family members. The Organization will request the Permanent Mission to the United Nations of the country of nationality of the staff member to confirm the existence and validity of the domestic partnership contracted by the staff member under the law of that country.
>
> 5. The present bulletin shall enter into force on 1 February 2004."

On 8 April 2004, the General Assembly adopted resolution 58/285, entitled "Human resources management", which in its operative paragraphs stated, inter alia, the following:

> "2. *Invites* the Secretary-General to reissue Secretary-General's bulletin ST/SGB/2004/4 after reviewing its contents, taking into account the views and concerns expressed by Member States thereon:
>
> 3. *Notes* the absence of the terms referred to in paragraph 4 of the bulletin in the context of the existing Staff Regulations and Rules, and decides that the inclusion of those terms shall require the consideration of and necessary action by the General Assembly."

Whereas the Applicant's principal contentions are:

1. Denying spousal benefits to his same-gender partner constitutes discrimination against the Applicant, as a homosexual staff member, who cannot enter into a "marriage".

2. The Respondent should honour a Member State's determination of eligibility for spousal benefits under national domestic partnership legislation, even if such partnerships are not labelled as "marriage". The emphasis should be on substance rather than label.

3. HRMS/UNON has previously recognized heterosexual cohabitation contracts as a basis for recognizing the parties to these contracts as "spouses" for the purpose of entitlement to benefits. The Respondent's refusal to recognize the Applicant's same-gender partnership is discriminatory.

4. The Organization should take the lead and develop mechanisms and concrete policies to support the current world-wide trend in favour of domestic partnership recognition.

Whereas the Respondent's principal contentions are:

1. The term "spouse" is widely referred to in the Staff Regulations and Rules in the context of "husband and wife", thereby precluding application of spousal benefits in respect of same-sex partners.

2. It is the established policy and practice of the United Nations to refer to the law of the staff member's home country in determining the staff member's marital status for United Nations administrative purposes.

3. The Respondent and the JAB correctly determined that France does not recognize the PACS as a union equivalent to marriage.

4. Whether or not to extend spousal benefits under the Staff Regulations and Rules is a policy question for the appropriate organs of the United Nations to decide.

The Tribunal, having deliberated from 1 to 23 July 2004, now pronounces the following Judgement:

I. The Tribunal has once again to decide on whether the partner of a United Nations staff member who is connected to that staff member through a tie other than marriage is entitled to the benefits provided for the members of a family constituted on the basis of marriage ties.

II. This question was submitted two years ago to the Tribunal, which, while stressing the constantly evolving nature of relations between two people and the great cultural diversity found throughout the world in such matters, avoided taking the place of the legislator and, pursuant to the law of nationality of the staff member in question, rejected the pension request submitted by the partner of a deceased staff member (Judgement No. 1063, *Berghuys* (2002).) This is the same position taken by the Administrative Tribunal of the International Labour Organization in Judgement No. 2193, *Mr. R.A.-O* (2003), adopted by three votes out of five, with two dissenting opinions. In *Berghuys* the Tribunal also noted the importance of the

principle on which the Organization bases itself in the area of questions on marital status, which is to refer to the law of the staff member's State of nationality: in this way it is possible to respect the various cultural and religious sensibilities existing in the world, as no general solution is imposed by the Organization, which simply tolerates and respects national choices. It indicated that, to determine a staff member's marital status, reference should be made to the definition applicable under the legislation of the participant's country, and cited the opinion of 15 December 1981 handed down by the Office of Legal Affairs, which stated the following with regard to de facto unions:

> "The law of a staff member's home country is used by the [United Nations] as the point of reference in determining a staff member's marital status for [United Nations] administrative purposes i.e. the home country is the forum state. Consequently, if a common law marriage [is] valid where contracted [and] is recognized by the law of a staff member's home country, the [United Nations] will also recognize it. But, if the marriage is not valid where contracted, or, even if it is valid where contracted, it is not recognized by the home country then, equally, the [United Nations] will not recognize it for the purpose of entitlements under [United Nations] Regulations and Rules."

In other words, the Organization will grant entitlements to the partner of a same-sex union only if his or her country of nationality recognizes that type of partnership and grants the partners social benefits; conversely, the Organization will not recognize such a partnership, if the staff member in question is the national of a country that is opposed to the legal recognition of this type of relationship. Reference to national law is the only method whereby the sovereignty of all States can be respected.

III. The Tribunal also showed foresight in noting that certain legal concepts could not be interpreted in a static way, but, being by definition constantly evolving concepts, should be interpreted with consideration for changes in society. The concept of couple and that of marriage are among such concepts, which by their nature are evolving concepts and become changed together with radical transformations in social behaviour and changes in social perceptions. Thus today some domestic partnerships that do not entail all the rights of marriage, especially where affiliation is concerned, are open either to couples comprising a man and a woman who may wish to have a less solemn union than the institution of marriage, or to partners of the same sex, two men or two women. The French Civil Solidarity

Pact (PACS), which is being invoked in this case, is among these new forms of commitment.

IV. It was precisely to take into account such changes, which are occurring throughout the world, that the Secretary-General issued bulletin ST/SGB/2004/4 entitled, "Family status for purposes of United Nations entitlement". This question is certainly not new and has been the subject of discussion for several years. In April 1998, the United Nations Consultative Committee on Administrative Questions (CCAQ) published conclusions on this matter, which were adopted in June 1998 by the Administrative Committee on Coordination (ACC), comprised of the administrative heads of the various organizations of the United Nations system. The recommendations basically stated that all agencies should strive to prevent discrimination with regard to same-sex partnerships. That is what the Secretary-General did, after due reflection, in 2004. In circular ST/SGB/2004/4, he interprets the concept of couple, taking into account both the general principle of reference to national law on which the Organization has always based itself and thereby accepting the fact that certain national bodies of legislation treat other forms of union between two persons as marriage for the purpose of granting benefits and entitlements:

> "A legally recognized domestic partnership contracted by a staff member under the law of the country of his or her nationality will also qualify that staff member to receive the entitlements provided for eligible family members. The Organization will request the Permanent Mission to the United Nations of the country of nationality of the staff member to confirm the existence and validity of the domestic partnership contracted by the staff member under the law of that country."

V. The Tribunal has often been called on to decide on the legal effects of and the rights deriving from circulars. The Secretary-General, as head of the United Nations Administration, has the power to adopt implementation circulars. In Judgement No. 89, *Young* (1963) it stated, with regard to a circular of a general nature:

> "[T]he Respondent is not justified in barring in an individual case the application of the interpretation of the relevant provisions he has given in a circular of general scope."

In Judgement No. 195, *Sood* (1975) the Tribunal acknowledged that a circular defined

> "a new policy ... and [was] designed to bring about a fundamental change in the future conditions of employment of precisely that category of staff into which the Applicant fell. It is the view of the Tribunal that [this] document ... created rights for staff members in this category even though they may not have been aware of the existence of the document or of the rights which it created."

The Secretary-General, in the exercise of his functions, issues administrative instructions and information circulars which the Tribunal has held to "have the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations" (Judgement No. 237, *Powell* (1979) para. XIII; Judgement No. 337, *Cordovez* (1984) para. IV).

VI. Consequently, before it applies the bulletin, the Tribunal should ensure that it is in conformity with the Staff Regulations and Rules. In the Tribunal's view, this raises two main questions. The first is whether the matter is one of a change in the Regulations requiring action by the General Assembly, or simply an interpretation of the Regulations. The second question will depend on the answer to the first and will involve, in the case of an amendment, whether the correct procedure has been followed, or, in the case of an interpretation, whether that interpretation is in conformity with the Regulations. Divergent views have been expressed on these questions in the Fifth Committee recently. States have taken opposing positions. Some States, while recognizing the administrative powers of the Secretary-General, believe that he has exceeded his mission: for example, the representative of Pakistan said that while his country "fully respected the authority of the Secretary-General as the chief administrative officer of the Organization, changing or amending the United Nations Staff Regulations and Rules was the prerogative of member States". (A/C.5/58/SR.32, para. 36)

VII. The Tribunal considers, in the first place, that the bulletin does not constitute an amendment to the Staff Regulations and Rules, but an interpretation of certain terms contained in them. The Regulations and Rules give no definition of the term "couple" or "marriage", hence the bulletin does not change a pre-existing definition. In this the Tribunal shares the view expressed by the Director of the General Legal

Division, who, when recently discussing this question in the Fifth Committee, stated:

> "... the Secretary-General's bulletin did not constitute an amendment to rule 104.10, but was a matter of interpretation of that rule ... Throughout the history of the Organization, changes in entitlements had been forward-looking and reflected developments in national legislation of Member States" (A/C.5/58/SR.35, 30 March 2004, para. 64).

VIII. Since an interpretation is involved, the Tribunal should in the second place ensure that this interpretation does not conflict with the letter and spirit of the Staff Regulations and Rules. Here, too, States have expressed divergent views. For example, the representative of Egypt stated before the General Assembly that "the bulletin contains concepts and terms not in conformity with the Staff Regulations and Rules" (A/58/PV.83, 8 April 2004). The Islamic Republic of Iran and Pakistan made statements to the same effect. Other States, on the contrary, have felt that the bulletin merely interpreted certain terms in the light of developments in certain national bodies of legislation. This was the position expressed, for example, by the representative of Canada, who said that "(t)he Secretary-General had the authority to interpret the Staff Regulations and Rules, while the Secretariat was simply continuing to apply national laws" (A/C.5/58/SR.35, 30 March 2004, para. 32). Similarly, the representative of Australia said he was "fully satisfied that the Secretary-General had acted within his authority and in accordance with ... the long-standing principle that the family status of staff members should be determined by applying national laws" (A/C.5/58/SR.35, 30 March 2004, para. 50).

IX. The Tribunal notes that the only decision the Secretary-General took was to confirm a long-standing practice of the Organization according to which personal status is determined by the national law of the person concerned, as stressed by the representative speaking on behalf of the European Union and representatives of other European States during a Fifth Committee discussion. That representative:

> "welcomed the Secretary-General's bulletin, which reflected his determination to modernize human resources management in the Organization, in line with legislative advances in many Member States and with the practice in other international organizations. The principle of determining family status according to the law of a country of nationality had been long-established and

> widely recognized in the Secretariat" (A/C.5/58/SR.32, 29 March 2004, para. 45).

Pursuant to this practice, which merely amounts to choosing applicable law, and in no way entails a new definition of marriage supposedly having United Nations approval, the Secretary-General simply took note of the fact that some bodies of legislation are now treating same-sex partnerships as marriage for the purpose of granting certain social benefits. This is no different, in the Tribunal's view, from the Organization's previously followed practice whereby, pursuant to the national law of certain States, it recognized polygamous unions, which are also distinct from marriage, i.e. the union of *one* man and *one* woman, in that they represent a union between *one* man and *several* women.

It is true that these various formulas are not uniformly accepted in the various States. As the representative of Canada stated during one discussion, "it was clear that the social and cultural issues underlying the discussion were emotive and deeply felt" (A/C.5/58/SR.35, 30 March 2004, para. 72). Social relations and in particular family relations are indeed controversial. And while polygamous unions are contrary to public policy in certain States, same-sex partnerships are contrary to public policy in others, as attested by the following denunciation of same-sex marriage delivered by the representative of Saudi Arabia before the General Assembly:

> "Same-sex marriage is a taboo in all religions. It is a grave sin and a great mistake to believe that the ultimate goal in life is to satisfy one's desires, because such a belief marginalizes the role of religion in one's life and alienates one from the commonly agreed principles of society. Such a belief gives free rein to the concept of individual freedom. Satisfying needs, even instincts, leads us to violate all sacred thought. Such extreme thinking alters societal concepts and human relations, runs counter to common sense and the requirements of coexistence and threatens the family unit" (A/58/PV.83, 8 April 2004).

A position of extreme opposition to same-sex partnerships was also expressed by the Holy See:

> "In the Secretary-General's bulletin, a domestic partnership was being equated with family, a policy which conflicted with article 16 of the Universal Declaration of Human Rights. The aim stated in the bulletin was to ensure

> respect for diversity, yet equating same-sex unions with marriage contradicted his delegation's basic understanding of marriage as being between a man and a woman and of the family as the basic unit or society" (A/C.5/58/SR.32, 29 March 2004, para. 55).

X. The Tribunal wishes to state once again that the United Nations is not a body for determining the societal choices of the various communities existing throughout the world. It is, on the contrary, a forum of tolerance where States with conflicting conceptions regarding family relations must learn to coexist. The position taken by the Secretary-General is the only one that allows for such coexistence and such respect for diversity, since it accepts both polygamous unions and same-sex unions. This point was particularly well brought out by the representative of Canada speaking before the Fifth Committee:

> "The issue was not whether delegations agreed or disagreed with any particular family model or relationship, but rather whether the United Nations should continue to apply national norms. The answer must be yes. Since family practice touched on most deeply felt cultural, social and religious values, the Organization's diverse membership could never agree on a single definition and there was therefore no alternative to the long-standing practice" (A/C.5/58/SR.32, 29 March 2004, para. 49).

The Tribunal believes that the Secretary-General remained perfectly within his role and that the Organization is being neither an advocate of nor an apologist for same-sex unions. This has been amply highlighted by the representatives of the Organization, in particular the Officer-in-Charge of the Office of Legal Affairs, who, replying to the members of the Fifth Committee, clearly explained the scope of the bulletin:

> "The purpose of the bulletin was not to address the substance of the same-sex marriage or domestic partnerships, but rather to state a principle of constant practice followed by all Secretaries-General. Several members of the Committee had asked whether the bulletin had introduced new definitions. In fact it contained none, having been confined to establishing the choice of law used by the Secretary-General in determining family status." (A/C.5/59/SR.35, 30 March 2004, paras. 19 and 20).

The same position was taken by the Bureau, Office of Human resources Management, before the Fifth Committee:

> "There had been no recent changes to the Staff Regulations and Rules dealing with family status of staff members and their entitlements in that regard, and the Staff Regulations and Rules contained no definition of 'marriage' or 'spouse' ... The position of the bulletin was neutral, implying no general recognition of the validity of same-sex marriages, or heterosexual or other domestic partnerships, but reflecting changes in the laws of Member States when administering the entitlements of staff members who where nationals of those Member States" (A/C.5/59/SR.35, 30 March 2004, paras. 5 and 7).

The Tribunal reiterates its conviction that the Organization has in no way changed the definition of marriage. United Nations policy remains the same: its policy has consistently been one of respect for national choices. What has changed, precisely, is some of those national choices, to which certain States are not favourable. But the Organization has to respect such changes.

XI. The Tribunal must therefore apply this bulletin, which entered into force on 1 February 2004. Needless to say, the bulletin is to be applied immediately, although it is not to have retroactive effect, as the Tribunal made clear in a previous case:

> "[N]o amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member, but nothing prohibits an amendment of the regulations where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such an amendment (Judgement No. 82, *Puvrez* (1961).)"

It is true that the application pre-dates the bulletin. The applicant and his same-sex partner made their union official on 22 June 2000 by agreeing to enter into a civil solidarity pact, in France, governed by Act No. 99-944 of 15 November 1995. As stressed by Judge Hugessen, a member of the ILO Administrative Tribunal, "By entering into this contract, they agreed to lead a common life together and undertook to furnish financial assistance to each other, to be jointly responsible for ordinary day-to-day expenses and housing costs, and to be subject to joint taxation." (See Mr. *R.A.-O* (*ibid.*).) French legislation recognizes, in particular, that a person linked through a PACS to a person covered by the social security system is that person's beneficiary for the purposes of entitlement to sickness and maternity insurance, paid leave, etc. On 26 June, the Applicant requested HRMS/UNON to grant his partner spousal benefits. However, on 10 July, the Administration rejected that application.

On 21 August, the Applicant requested the Bureau chief to review that decision. On 7 September, the Applicant applied to the Secretary-General to obtain a review of that decision. On 5 December 2002, the Applicant lodged an appeal with the Joint Appeals Board, which recommended that he should be denied the benefit of such entitlements for his partner. The Secretary-General followed those recommendations. It is for that reason that the Applicant turned to the Tribunal. It is noted that the Applicant is requesting "(t)he payment of compensation covering at least all benefits and entitlements which have been denied to me since 12 June 2000 when I requested HRMS/UNON to grant, on the basis of my same-gender domestic partnership, benefits and entitlements similar to those which derive from marital status". The Tribunal considers that, when he made his request, the Applicant did not have a right to obtain benefits for his partner, in conformity with the legal precedent contained in *Berghuys*, and that the Administration was right to refuse his request. However, the Tribunal believes that the Applicant now has the right to obtain for his partner the benefits he is claiming under the Civil Solidarity Pact, which is envisaged by the bulletin, but only from 1 February 2004 onwards.

XII. The Tribunal should also mention that all changes encounter opposition and that there was some criticism of this bulletin in the General Assembly. While it is true that the Secretary-General manages the staff members of the Organization, he cannot change the Regulations without the approval of the General Assembly, in conformity with chapter XII, Regulation 12.3 of the Regulations concerning "General Provisions":

> "The full text of provisional staff rules and amendments shall be reported annually to the General Assembly. Should the Assembly find that a provisional rule and/or amendment is inconsistent with the intent and purpose of the Regulations, it may direct that the rule and/or amendment be withdrawn or modified."

There is no question, for the moment, of amending the Staff Regulations or Rules. Quite recently, on 26 April, the General Assembly adopted resolution 58/285, entitled "Human resources management", in which certain concerns are expressed. The operative portion of this resolution reads as follows:

> "1. *Notes* the practice in the Organization of determining personal status for the purpose of entitlements as are set out in the Staff

Regulations and Rules of the United Nations by reference to the law of nationality of the staff member concerned;

2. *Invites* the Secretary-General to reissue Secretary-General's bulletin ST/SGB/2004/4 after reviewing its contents, taking into account the views and concerns expressed by Member States thereon;

3. *Notes* the absence of the terms referred to in paragraph 4 of the bulletin in the context of the existing Staff Regulations and Rules, and decides that the inclusion of those terms shall require the consideration of and necessary action by the General Assembly".

The Tribunal does not see this resolution as an order from the Assembly requiring a change in the Staff Regulations or Staff Rules. It simply *notes* that if the contents of the bulletin were to be incorporated in the Staff Regulations or Rules, the Assembly should be consulted. It is true that the resolution invites the Secretary-General to review the situation, but there is nothing to indicate what the contents of a new bulletin would be, much less if and when a new bulletin will be issued. For the moment, this bulletin is in force and might well remain in force, according to the Officer-in-Charge of the Office of Legal Affairs:

"If the Member States decided to overrule the bulletin, it would be a matter for them, but any rumour that the Secretary-General was planning to withdraw it was unfounded" (A/C.5/59/SR.35, 30 March 2004, para. 22).

The Tribunal is obliged to apply existing positive law. It states once again that the Secretary-General, as head of the United Nations Administration, has the power to issue circulars having the same legal value as the Staff Rules. The Tribunal, having noted that the bulletin is not contrary to the Staff Regulations and Rules, is therefore bound to apply it; it can neither refer to rules that have been abolished, nor even less prejudge the contents of future rules, as it has already had occasion to emphasize, also in connection with the application of a circular:

"Each of the staff members in question was entitled to expect that his individual legal status would be determined on the basis of the interpretation given in that *circular*, which had been issued by the competent authority and *was binding on the latter until properly amended*" (Judgement *Young*, *ibid.*). (Emphasis added.)

XIII. For these reasons, the Tribunal decides that, from 1 February 2004 onwards, the Administration must grant the partner spousal rights.

XIV. In view of the foregoing, the Tribunal:

1. Orders that the Applicant be paid all spousal benefits and entitlements as of 1 February 2004; and

2. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Brigitte **Stern**
Vice-President

Jacqueline R. **Scott**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Secretary